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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC.;
ELDORADO INSURANCE CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is error to interpret a statute providing:

> "In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide... compensation for one hundred and four weeks only"

as requiring the employer to prove on the issue of existence of preexistent "permanent partial disability" that

> "...the claimant (had) a manifest physically disabling condition serious enough to motivate a cautious employer to discharge him rather than incur the possibility of incurred liability";
>
> that the employer did "treat the claimant as disabled";
>
> that the employer did treat the claimant "differently after previous injuries";
>
> that the disability not be "asymptomatic"; and
>
> that the disability (psychological)

be "severe psychological problems".

2. Whether it is error and departure from accepted and usual judicial proceedings to reinstate a trial judge's determination that claimant's "disability" was due "solely to the injury," without examination of the evidence, when it was uncontroverted that the trial judge erred in his belief that pre-existing "permanent partial disability" must be economically disabling.

3. Whether there has been departure from accepted and usual judicial proceedings and abuse of judicial discretion by apparent adoption of a party's arguments of existence of "findings of fact" not existent in the record; absence of evidence when evidence is evident in the record and existence of findings of fact resolving "conflicting evidence" when on the issues in question there is no conflict in the evidence.

TABLE OF CONTENTS

	PAGE
Question presented for review . . .	i
Opinions below	1
Jurisdiction	2
Statutory provisions involved . . .	2
Statement	4
Reasons for granting petition . . .	17
Conclusion	26
Appendix A	1a-31a
Appendix B	1b-3b
Appendix C	1c-10c
Appendix D	1d-15d
Appendix E	1e
Proof of service	27

TABLE OF AUTHORITIES

Cases:

American Mutual Insurance Co. of Boston v. Jones, 426 F.2d 1263 .	22
Atlantic & Gulf Stevedore, Inc. v. Director, 542 F.2d 602	13, 19
Cordero v. Triple A Machine Shop, 580 F.2d 1331	20
Director v. Universal Terminal Stevedoring Corp., 575 F.2d 452 .	22
Equitable Equipment Co. v. Hardy, 548 F.2d 1193	13
Lawson v. Swanee Fruit & Steamship Co., 336 U.S. 198	18, 21
Potomac Electric Power Co. v. Director, 449 U.S. 268	25

	PAGE
Statutes:	
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.	
Section 2(10), 33 U.S.C. 902(10)	2
Section 8(f)(1), 33 U.S.C. 908(f)(1)	3,12,14, 18,19,22, 23,24,25
Section 49, 33 U.S.C. 949 . . .	3,22

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PETITION FOR WRIT OF CERTIORARI TO
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Campbell Industries, Inc., and its workers' compensation insurance carrier, Eldorado Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Order Denying Respondents' Petition for Rehearing (App. E, infra, 1e) is not reported.

The opinion of the Court of Appeals (App. D, infra, 1d-15d) is reported at 678 F.2d 836 (1982), 14 BRBS 974.

The Decision and Order of the Benefits Review Board (App. C, infra, 1c-10c) is reported at 13 BRBS 227.

The Decision and Order of the Administrative Law Judge (App. A, infra, 1a-31a)

The Amended Decision and Order of the Administrative Law Judge (App. B, infra, 1b-3b).

JURISDICTION

The opinion of the Court of Appeals (App. D, infra, 1d-15d) was entered on June 4, 1982. A petition for rehearing was denied on July 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the Court of Appeals was invoked under 33 U.S.C. 921(c).

STATUTORY PROVISIONS INVOLVED

1. §902(10) of the Longshoremen's and Harbor Workers' Compensation Act, as amended effective November 26, 1972, 33 U.S.C. 902(10) provides in part:

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury

in the same or any other employment."

2. §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended November 26, 1972, 33 U.S.C. 908(f)(1) provides in part:

> "(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury....
>
> "In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide...compensation for one hundred and four weeks only."

3. §949 of such Act, 33 U.S.C. 949 provides in part:

> "Discrimination Against Employees Who Bring Proceedings. It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee

as to his employment because such employee has claimed or attempted to claim compensation from such employer...Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination..."

STATEMENT

Claimant Lostaunau, a 41 year old waysman, sustained low back strain while shoveling sand during the course of his employment by petitioner, Campbell Industries, on September 16, 1973. Claimant also sustained four previous injuries to his back with the same employer then insured by another workers' compensation insurance carrier, these occurring January 27, 1971; April 26, 1971; April 13, 1972 and December 12, 1972. At time of trial, he claimed that he was totally and permanently disabled as a consequence of these five injuries due to orthopedic and psychiatric disability.

The employer and insurance carriers disputed the claim of disability maintaining

that claimant was employable and had residual wage-earning capacity within the meaning of §908(c)(21), (h) of the Act.

The instant petitioners also raised the issue, here presented, that should there be finding of permanent disability, that their liability therefore was limited to 104 weeks of compensation on the grounds that the claimant had permanent and partial disability both of an orthopedic and psychiatric nature prior to the injury of September 16, 1973 and that any existing disability is materially and substantially greater than that which would have resulted from the injury of September 16, 1973 alone.

The evidence on that issue insofar as the back claim is concerned was the circumstance that claimant had four prior claims of record with the same employer.

In conjunction with one of those claims, report of O. S. Harbaugh, M.D., to the employer under date of April 17, 1972, reported in part:

> "On April 13, 1972, he picked up a plank and had pain in his

low back...Previous history of back injury. He was treated at Campbell for this and did not see a M.D."

Under "Nature and Extent of Disease", the doctor reported:

"Sprain, lumbosacral spine, acute and moderately severe."

At paragraph 13 under "X-rays", there is included:

"Lateral scoliosis and compensatory curve in the thoracic spine."

Claimant's former supervisor testified that claimant, during the course of his employment, had complained of his back hurting and that the claimant had a reputation of having hurt his back.

Claimant in his deposition three times acknowledged that his back symptomatology had existed ever since the time of his first back injury. At time of trial, claimant denied such history maintaining that his back pain stemmed from his injury of September 16, 1973 (on which there was no statute of limitations defense and a higher compensation rate).

Medical evidence consisted of report

from claimant's examining orthopedist, Richard Saar, M.D., who in a report of March 29, 1979 at page 4 stated in part:

> "2. Degenerative disc disease. A man of 41 with a significant degree of scoliosis this man shows may be expected to have considerable degenerative disc disease...On the basis of his work record, the lack of symptomatology prior to the industrial accidents, it must be concluded that this condition was asymptomatic and nondisabling prior to the series of industrial accidents and, as a result of those accidents became symptomatic and disabling." [Emphasis Added]
>
> "3. Lumbar scoliosis, idiopathic. This is a moderate scoliosis and this means he has considerable deformity. It cannot be ignored as a source of disability, having been aggravated several times by the on-the-job injuries while working as a waysman."

Opinion of petitioners' physician, R. G. Lambert, M.D., was similar.

On the psychiatric issue, the evidence developed was that the claimant was born of a wealthy Peruvian family and spent his early years as a playboy, waited upon by mother and sisters. He came to the United States and followed the same lifestyle for about two years

when suddenly cut off by his family. He was forced to go to work as a dishwasher and busboy. He married an older woman and became a radio announcer for a Spanish speaking station. He met and moved away with a 16 year old girl whom he then married and thereafter, after working as a janitor, went to work for employer as a waysman, a term for a shipyard laborer. He regarded all of this laboring type of work as beneath his station.

Claimant's initial evaluating psychiatrist, Dr. Northrup, testified in his deposition that the stresses in this man's life were longitudinal and that "these are the evidences of this man having a personality or propensity not to handle stress as well as other people." He further testified that claimant's psychological state had been manifested by his poor work record, lack of maturity and dependence on family.

Dr. Graner, petitioners' last evaluating psychiatrist, diagnosed the claimant as having a passive dependent personality which would

have been characterized by not wanting to work, wanting to find some other way to be cared for financially. He further testified that had the employer, at time of hire, had psychiatrically examined Mr. Lostaunau, that such diagnosis would have been evident.

Claimant's former supervisor, Mr. Becerra, testified that the claimant during his work, if not watched, would "disappear on you"; was a below average worker; could not work without supervision, and if not constantly watched would not work. He then concluded by stating:

> "Well he wasn't very dependable either. He hardly showed up for work, missed a lot of work."

Dr. Graner testified that in view of claimant's preexisting passive-dependent personality (prior to his injury of September 1973 and assuming further that thereafter he has suffered some degree of depression) that such depression is of greater degree than would have otherwise occurred in the absence of the underlying preexisting passive-dependent personality thereafter stating:

> "I think there is greater depression that there would have been otherwise because dependent people expect more. They're more often disappointed and when they are disappointed they are more depressed."

On the issue of permanent disability there was conflicting medical evidence as to the degree of disability. Mr. Lostaunau testified that he was able to work at a variety of jobs established by the employer to be available to him in the open labor market.

The trial judge in Decision and Order of October 12, 1979, determined that based upon conflicting medical opinion and resolving doubts in claimant's favor, that claimant was permanently and totally disabled.

The judge then went on to state in part:

> "My impression is that the claimant is a pathetic former 'playboy' from an economically advantaged Peruvian family who is preoccupied with his adult loss of status which has forced him to perform work beneath what he feels is his 'station'. His lack of self-esteem is not without foundation. He has a life long history of being the beneficiary of symbiotic relation-

> ships. I do not doubt that his personality disorder is a life long condition but prior to September 16, 1973, he exhibited a capacity to cope and function in an employment situation however unsuited and unsavory...
>
> "If this case were limited to the orthopedic findings I would not find claimant permanently and totally disabled as I feel that he is physically capable of securing employment in retail sales, hotel work or banking in the San Diego area which is presently available...
>
> "However, this case is not limited to claimant's orthopedic impairment but is more significantly related to his psychiatric impairment...."

After reviewing the evidence on the issue of disability, the judge concluded:

> "Such permanent total disability is solely the proximate result of the injury of September 16, 1973."

The court then turned to petitioners' claim for §8(f) relief stating that the employer must show that (1) claimant had an existing permanent partial disability prior to the injury of September 16, 1973; (2) such disability was manifest to the employer; and that (3) the current disability is not due

solely to the subsequent injury of September 16, 1973.

The judge then stated:

> "The evidence is clear herein that claimant never had an existing permanent partial disability prior to the injury of September 16, 1973. The personality disorder which may have been of life long duration was not a 'disability' within the meaning of section 2(10) of the Act which defines disability as meaning an incapacity because of injury to earn wages. Clearly, claimant was perfectly capable of employment and of coping prior to the injury of September 16, 1973. He was not economically disabled. Secondly, such disability was not manifest to the employer....
>
> "...Finally, I conclude that claimant's current disability is due solely to the injury of September 16, 1973. Section 8(f) of the Act is not applicable."

From such Decision, petitioners filed Petition for Review with the Benefits Review Board.

Petitioners urged that the trial court had erred as a matter of law in denying petitioners §8(f) relief because of the trial judge's mistaken assumption that preexisting "partial disability" had to be economic in

nature citing Atlantic & Gulf Stevedores, Inc., v. Director, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); Nacirema Operating Co. v. Benefits Review Board, 538 F.2d 73, 4 BRBS 190 and Equitable Equipment Co. v. Hardy, 548 F.2d 1192, 6 BRBS 666 (5th Cir. 1977).

Petitioners also urged that the uncontroverted evidence indicated that claimant's orthopedic and psychiatric disability was manifest to the employer prior to the injury of September 1973.

The Benefits Review Board granted petition on this issue and in Decision and Order dated February 23, 1981 stated in part:

> "Our review of the administrative law judge's decision indicates that his findings of no pre-existing disability was based on the fact that claimant was able to work prior to his September 16, 1973, injury. However, there is no requirement that the preexisting condition be economically disabling for Section 8(f) to apply...
>
> "....
>
> "Our review of the record reveals that all of the evidence supports a finding that claimant had a

> preexisting permanent partial disability as required by the C & P Telephone test....
>
> "Similarly, the evidence indicates that claimant's existing permanent partial disabilities were manifest to employer and that all the doctors attributed at least some of the claimant's disability, both psychiatric and orthopedic, to his pre-September 16, 1973, condition.
>
> "Accordingly, the administrative law judge should have found employer entitled to relief under Section 8(f) of the Act."

The Director filed Petition for Review with the Court of Appeals for the Ninth Circuit alleging that the Benefits Review Board had exceeded its scope of review of the administrative law judge's decision and as to whether the employer had met the requirements for relief under §8(f).

The Director argued that the findings on 8(f) were predicated upon disputed evidence which could support more than one result; that the administrative law judge's findings were supported by substantial evidence and could not be disturbed by the Benefits Review Board.

Petitioners herein responded that the trial judge's findings were predicated upon erroneous definition of preexisting "partial disability" and that the Benefits Review Board had merely applied the correct standard to the undisputed facts.

The Court of Appeals on the first issue determined:

> "The Board is not at liberty to reweigh the evidence and substitute its own view."

The court in reviewing the three findings of the administrative law judge on the issue stated in part:

> "Although the administrative law judge applied an economic disability standard, his finding should be upheld because the employer did not meet the more liberal test applied in C & P Telephone, 564 F.2d at 513. The claimant did not have a manifest, physically disabling condition serious enough to motivate a cautious employer to discharge him rather than incur the possibility of incurred liability. This was a finding of fact." [There is no such finding of fact in the record.]

The court went on to conclude:

> "Because the record in this case

> contains conflicting evidence and this determination is a factual one, we uphold the administrative law judge's determination."

Then in examining the manifest test, the court concluded in part:

> "Campbell had no medical records before the 1973 injury which show that the claimant had degenerative disc disease or psychological problems. Although the claimant had three back injuries, he was released for work each time. His back condition was asymptomatic until 1973. All the medical reports cited by the Board were after the 1973 injury. Furthermore, Campbell did not treat the claimant any differently after the other back injuries. The claimant resumed his normal work activities.
>
> "...there was almost no objective basis for determining that he had severe psychological problems. These problems did not appear until after the 1973 injury when the claimant could no longer work. Only one psychiatrist testified that the employer could have discovered claimant's condition through a psychological test. There were no psychological symptoms manifested by the claimant."

The court then affirms the administrative law judge's determination that "claimant's total disability was due solely to the 1973

orthopedic injury combined with psychiatric impairment" stating further "the administrative law judge's finding in this case is based on conflicting evidence" and is supported by "substantial evidence." "The Board does not satisfactorily explain why it came to the opposite conclusion. We must affirm the factual findings of the administrative law judge."

The court's decision makes no reference to the actual record. There is no inquiry as to how the trial judge's conclusion that all disability was attributable to the September 1973 injury was supportable had he not erroneously assumed that any other or preexisting disability must be economic in nature.

REASONS FOR GRANTING THE PETITION

This case presents an excellent example of statutory erosion and rewriting of a straightforward statute, the effect of which places the employer, subject to the Longshoremen's and Harbor Workers' Compensation Act, in a catch-22 situation regarding the

hiring and retention of employees with partial disability.

The case further presents an example of confusion which can result when an appellate court attempts to review an issue of law when that "law" consists of a maze of judicially created limitations, provisos and nuances, sometimes contradictory, the application of which obscures the plain meaning of the statute and the legislative reason therefor.

This Court first interpreted the meaning of "disability", within the framework of §8(f)(1) of the Longshoremen's and Harbor Workers Compensation Act, in the case of Lawson v. Swanee Fruit & Steamship Co., 336 U.S. 198, 69 SCt. 503, 93 LEd. 611 (1949). The Court recited the legislative history leading to the enactment of §8(f) Special Fund relief to the employer. Such purpose was to prevent an employer from discriminating against the handicapped worker. Examples given in the legislative history concerned one-eyed, one-legged, one-armed men. The

Director urged that interpretation of "disability" within the meaning of §8(f) to exclude nonindustrial disability. In rejecting such contention, the Court concluded that the term "disability" was not used as a term of art in §8(f)(1) thus rejecting the contention that "disability" be interpreted in conformance with §902(2) of the Act.

The Court of Appeals in Atlantic & Gulf Stevedores, Inc. v. Director, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976), rejected the Benefits Review Board's reasoning that the term "existing permanent partial disability" as contained in §8(f)(1), as contained in the 1972 amendment, was more restrictive than the term "previous disability" as used in the unamended Act.

The Court of Appeals, rejecting the Benefits Review Board's and Director's contention that "existing permanent partial disability" required the disability to be economically disabling stated that such an interpretation would transform §8(f) into a

catch-22 situation stating at 542 F.2d at 609:

> "Any employer who in reliance on §8(f) hired a disabled person would immediately lose the statutory limitation on his liability, since upon hiring a handicapped worker any preexisting economic disability would terminate. The result is, of course absurd, and is inconsistent with the policy objectives discussed in the Lawson case."

A case frequently cited for the opposite proposition is that of Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744, (9th Cir. 1978). Such decision affirmed a decision of an administrative law judge that there was no preexisting disability because of the absence of evidence that the claimant's preexisting cough interfered with his ability to perform his work.

The Court of Appeals for the Ninth Circuit in the instant decision does not make a definitive statement as to its position on this question of interpretation.

The result in the instant case gives credence to the proposition that the Court

of Appeals for the Ninth Circuit deems that "partial disability" within the meaning of §8(f) must be economically disabling. It has affirmed an administrative law judge decision predicated upon such understanding of the law.

The circumstance remains that the administrative law judge rejected preexisting "partial disability" as a causative factor (in determining sole cause) because the partial disability was "not economically disabling." No explanation to the contrary is given in the decision.

Thus, 33 years after this Court issued the Lawson decision, the lower courts and administrators appear to question or ignore the holding.

The decision in question further erodes the definition of "partial disability" by finding that it not be "asymptomatic"; that it be "severe" in degree; that the employer must treat the employee as disabled; and "treat differently" those partially disabled.

Lastly, the Court adopted the rule

of other decisions that the "partial disability" must be "serious enough to motivate discharge."

Such interpretations of "partial disability" within the meaning of §8(f)(1) requires that the employer (in the instant case) in order to obtain Special Fund relief, act in a manner which is prohibited by §949 of the Act, supra which prohibits discrimination against employees who have workers' compensation claims.

The Court of Appeals in the instant case, requires that the employer have a pre-existing "partial disability" "manifest" to the employer.

The manifest concept appears to have arisen from a series of decisions commencing with that of American Mutual Insurance Co. of Boston v. Jones, 138 U.S.App. D.C. 269, 426 F.2d 1263, 1267 (1970). Inroads have been made on the restrictive effect of such decision. For example, in the case of Director v. Universal Terminal & Stevedoring Corp., 575 F2d. 452, 8 BRBS 498 (3d Cir. 1978),

the court rejected the requirement that the employer have actual knowledge of the pre-existing partial disability and may establish that such disability is latent, the existence of which is reflected in medical records (heart disease case).

Congress wisely omitted the "manifest" concept when it enacted and reenacted this statute.

Its judicial inclusion cuts the heart out of the purpose behind the enactment of §8(f) particularly in today's workers' compensation arena in which claims predicated upon psychological injury; cardiovascular injury; pulmonary injury and various degenerative diseases are rampant.

Union rules and state and sometimes federal legislation prohibit employers from conducting preemployment and indeed post-employment physicals. In some types of industries, such as the longshore industry, the immediate need for employees precludes time for preemployment physicals.

Moreover, a most expensive and sophisticated medical examination is required to determine the existence of the underlying medical disability which might exist in the psychological, cardiovascular, pulmonary and degenerative disease categories: particularly when the employee seeks to conceal the existence of such disease.

Is §8(f) Special Fund relief to be afforded to those employers who have the good fortune to hire employees who candidly report existence of known disease processes? Are employees who are not candid able to thereby preclude to their employer subsequent 8(f) relief should such disease processes or partial disability play a part in future greater disability in conjunction with industrial injury?

Is the sophisticated wealthy employer having the capability to perform extensive pre and post-employment physicals, by which to develop evidence of "manifest", to be thus favored in the §8(f) arena over the smaller,

less sophisticated and poorer employers?

All employers and insurance carriers are taxed on a pro rata basis in order to fund the Special Fund out of which §8(f) liabilities are paid.

This Court in Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 101 SCt. 509, 66 LEd. 2d 446, 14 BRBS 363 (1980), eliminated judicially created confusion and overlap in the interpretation and application of §908(c) of the Act pertaining to scheduled disabilities. The same pruning process applied to §908(f)(1) would aid and simplify the application, administration and understanding of the apparent plain meaning of that provision.

The opinion of the Court of Appeals contains a reported "finding of fact" not contained in the record.

The opinion reports existence of administrative law judge resolution of factual conflicts not existent in the record on the issue presented.

The court does not examine facts in the record measured by correct definition of "partial disability."

The court does not remand the case to either the Benefits Review Board or to the administrative law judge to resolve these questions.

In a time when appellate court calendars are crowded with criminal and other personal due process cases, one pertaining to the efficient operation of the wheels of commerce can be disregarded with no loss of life or liberty. Yet in the absence of viable and sustaining economic community, the other questions become moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DECISION AND ORDER
OF ADMINISTRATIVE LAW JUDGES
SAN FRANCISCO REGIONAL OFFICE

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office

In the matter of	
HUGO LOSTAUNAU	CASE NOS. 79-LHCA-964-S, 965-S, 972-S, 1219-S & 1220-S
Claimant	
v.	
CAMPBELL INDUSTRIES, INC.	OWCP Nos. 13-25471, 13-16936, 13-17611, 13-33655 & 13-33486
Employer	
ELDORADO INSURANCE COMPANY	
Carrier	
WESTERN EMPLOYERS INSURANCE COMPANY	
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BEFORE: HENRY B. LASKY
Administrative Law Judge

DECISION AND ORDER

Claimant seeks benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., hereinafter referred to as the "Act". A hearing was held in San Diego, California, on June 20 and 21, 1979, and rescheduled for further hearing on August 6 and 7, 1979, in order for employer to prepare and present rebuttal testimony. Prior to the resumption of the hearing on August 6, 1979, counsel for employer was granted a continuance for good cause and the hearing was resumed on September 13, 1979, and completed on September 14, 1979.

At the outset of the hearing, the parties entered into certain stipulations with reference to the five (5) consolidated cases. Based on the stipulations of counsel, the evidence introduced, my observations of the

demeanor of the witnesses, and having considered the arguments of counsel, I make the following findings of fact and conclusions of law, and order.

Findings of Fact and Conclusions of Law

Claimant is 41 years old with a date of birth of February 20, 1938. Originally from Peru, he enjoyed the advantages of a family of financial affluence. Claimant attended one year of college which he left in 1956. For the next nine years claimant essentially "vacationed" in the western hemisphere while being supported by his family. With the exception of a six-month period of working for Sears as a salesman, in Peru, he enjoyed Miami, Chicago, Washington, and New York at the expense of his indulgent mother. In approximately 1966 the family support stopped following his mother's death and the claimant was compelled to seek employment. Circumstances required that he accept employment as a dishwasher, janitor, busboy, sandblaster, and waysman (general laborer). Claimant is unbelievable when he testified that he did

not know why the family stopped sending him money, nor did he ever inquire why his family support was terminated. It is difficult to believe that a person of affluence who is suddenly required to seek employment as a dishwasher would not make any inquiry as to why the economic support from his family was terminated. Ultimately, claimant worked as a radio broadcaster with a Spanish speaking radio station in San Francisco. While in San Francisco he married a 52 year old woman when he was 28 which he recognized as a "mother figure". After nine months of marriage he was allegedly divorced and he later allegedly married a 16 year old girl. Although he enjoyed being a radio broadcaster, he left his job to travel to San Diego for his second honeymoon and decided to remain away from San Francisco where his first wife still resided. An interpreter was provided at the hearing to enable claimant to testify and follow the proceedings, although it is apparent from the voluminous record and the evidence introduced that claimant is bilingual and is somewhat

selective in choosing when and where to claim difficulty in either speaking or comprehending the English language.

After arriving in San Diego, he has worked as a truck driver, driving a laundry truck, and in October of 1970, he started work for Campbell Industries as a waysman.

In Case No. 79-LHCA-965-S, which arises out of an on-the-job injury on January 27, 1971, claimant fell while painting a ship and hurt his knee, leg, and back for which he received first aid attention. He returned to work on January 31, 1971, after receiving one day of temporary total disability and he was able to return to his normal work without any residual medical problems. It is clear that claimant is not entitled to any further benefits under the Act for this injury.

In Case No. 79-LHCA-972-S, claimant was injured on April 26, 1971, in the course and scope of his employment while building a scaffold to repair a ship when he developed neck pain. He received appropriate temporary total disability of $30 following first aid

treatment and returned to his regular employment on May 3, 1971, without any residual medical problems.

Approximately one year later, on April 13, 1972, in Case No. 79-LHCA-1220-S, claimant was picking up a plank in the course and scope of his employment and developed a pain in his back and groin. He saw a physician for treatment but since he was not off work for the required period of time received no disability, nor was he entitled to any, and he returned to his regular work as a waysman without any further medical complaints or limitations.

On December 12, 1972, in Case No. 79-LHCA-1219-S, claimant allegedly hurt his back while lifting a support block while repairing a ship. He received medical attention, was not off work a sufficient period of time to be entitled to disability benefits, and returned to work without any further problems with his back from this injury and was able to resume his regular duties.

In all of the four preceding cases claimant is not entitled to any additional

benefits under the Act from the employer and its then insurance carrier, Western Employers Insurance Company. In addition, the claims for the injuries of January 27, 1971 and April 26, 1971, were not filed until February 25, 1975, despite the fact that employer filed timely first reports of accident in each instance. As a consequence, the claims are barred by the statute of limitations for failure to file within one year from the date of injury under section 13 of the Act. In the claim arising out of the injury of April 13, 1972, such claim was not filed until February 28, 1975, despite the employer's filing of timely first report of accident and is also barred by the statute of limitations under section 13 of the Act. Finally, the statute of limitations is not a valid defense for the case arising out of the injury of December 12, 1972. Although the claim was not filed until February 28, 1975, the statute of limitations was tolled under section 30(f) of the Act as the employer acknowledged that they had failed to file a first report of accident. Notwith-

standing, as stated earlier, no additional benefits to the claimant are warranted for the injury of December 12, 1972.

With reference to his injury of September 16, 1973, in Case No. 79-LHCA-964-S, claimant was working in his capacity as a waysman (general laborer) for Campbell Industries repairing a ship and was shoveling sand for a sandblaster pot when he twisted his low back. He subsequently received medical attention and was told to stay off work and physical therapy was prescribed for the pain in his low back. Claimant testified that this low back pain was totally different from any prior instance of low back injury. Claimant saw a Dr. Harbaugh and Dr. Wiggins, who subsequently released him to return to work five to six weeks later in November of 1973. He was assigned heavy duty work and was unable to complete the day and was referred back to the physicians for pain pills and physical therapy. He was again released to return to work in mid-November of 1973 and was assigned to move blocks which weighed 80 to 90 pounds and the pain returned

again and he was unable to perform his duties.

For all practical purposes claimant has not been able to return to work according to his testimony, since the injury of September 16, 1973. A timely claim for compensation was filed on his behalf and a notice of controversion was ultimately filed on October 3, 1977. The claimant's average weekly wage at the time of the injury of September 16, 1973, was $166.40 with an appropriate compensation rate of $110.93. Claimant was paid temporary total disability from September 17, 1973 through November 25, 1973, at the rate of $110.93. From June 19, 1975 through August 25, 1976, claimant was paid temporary total disability at the rate of $103.18. No adequate explanation was offered as to why he was paid at an inappropriate compensation rate during the aforesaid period of time. From August 26, 1976 through August 31, 1977, claimant was paid advances on permanent disability at the rate of $103.18 and as a consequence his employer has made a total payment for the dates indicated of $14,267.17.

Ultimately, claimant came under the care of Dr. Brantz, a chiropractor, because he felt the medical treatment that he had been receiving was inadequate. However, on July 17, 1974, Dr. Brantz had released claimant for light work with a restriction from lifting over 10 pounds. Claimant went to his employer with this light work restriction and was told there was no light work available and they would contact him if any became available. He never heard from them again. In 1975 claimant saw Dr. Northrup, a psychiatrist, because he was depressed and demoralized and he testified that the depression started when he went back for light duty work and they told him that there was none available. Essentially, claimant has made little or no genuine effort to obtain any employment other than as previously recited.

The medical records in this case are voluminous and conflicting both among orthopedists as well as psychiatrists. I have carefully reviewed all of the medical records and have concluded that there is such a conflict

of opinion that one might choose any predetermined result and find sufficient medical support permeated in the medical records. The orthopedic opinions range from "no residual disability of any significance" to "permanent total disability". Psychiatric opinions varies from "total temporary disability with further psychiatric therapy indicated", "total permanent disability without further psychiatric therapy", and finally, to the ultimate conclusion that claimant is malingering. There is some evidence to support all conclusions.

For two years preceding the hearing claimant asserts that his physical condition has gotten worse and he has pain, headaches, neck, arm, shoulder, leg, feet and low back complaints. All of these complaints are associated with movement but more importantly he feels he is destroyed emotionally. He feels he is "nothing" and his emotional problems consist of feeling oppressed, lack of trust in anyone, feelings of worthlessness because of his inability to support his family, loss

of respect from his children who tell him he is nothing because he does not work, and loss of respect from his wife. Since 1973, he tried to go back to school and in 1975 he enrolled in a college program taking English but only took one semester. Again in September of 1978 he took a course in Interior Design but claims he was able to complete only one semester of a three semester program. He dropped out again because of feelings of depression and lack of self-esteem in February of 1979.

Approximately 10 days prior to the hearing in June of 1979 he attempted suicide and was hospitalized at the Clairmont General Hospital following an overdose of pills which he took following the completion of a suicide note addressed to his wife. The suicide note which was admitted into evidence expresses all his anger and depression and he blames his current status on Eldorado Insurance Company and well as his own lawyer who he feels is not supportive of him. It is this note that provides the most persuasive evidence that claimant

is not a malingerer. Both before and after the hearing days in June of 1979 he has assaulted his wife with a knife and threated his children.

On November 27, 1973, Dr. Wiggins concluded that claimant had no orthopedic disability of any significance and was capable of working without restriction. Although there was x-ray evidence of long standing minimal scoliosis it was not evident on physical examination. In November of 1974, Dr. Saar felt that claimant's complaints were largely an hysterical reaction. On January 6, 1975, he concluded that claimant was suffering from degenerative disc disease which was present prior to the accident but was asymptomatic until the 1973 injury and similarly the idiopathic scoliosis, which existed prior to the accident and had been asymptomatic, was now somewhat disabling. Dr. Saar recommended that claimant see a psychiatrist. In February of 1975, Dr. Wright, a psychologist, concluded that claimant was functioning within a bright normal range to low superior range and that he

was more intelligent than that which the test revealed because of language limitation. In May of 1975, Dr. Northrup, a psychiatrist, concluded that the injuries of 1971 and 1972 were all of a temporary nature without significant residuals. The injury of September 16, 1973, has resulted in an axiety reaction with depression and hysterical features. Dr. Faguet diagnosed claimant in June of 1975 as suffering from anxiety neurosis with depressive features and the disorder resulted from the injury of September 16, 1973, which was stressful enough to make overt a covert psychological liability. Dr. Faguet felt that claimant was amenable to psychiatric treatment and that his disability was partial and temporary and would not interfere with work or attendance at school.

In December of 1975, claimant was hospitalized for two days because of chest pain when he thought he was having a heart attack, which was not the case, and was obviously an emotional episode. He told Dr. Faguet he felt like a "parasite", as he was unproductive and driven to welfare support which has

affected his sense of dignity. In August of 1976, Dr. Wiggins, a orthopedist, reported that claimant was permanent and stationary as far as his orthopedic problems were concerned and concluded that claimant had a 12 percent impairment of the whole man as a result of his back complaint. In September of 1976, Dr. Faguet rendered the opinion that claimant was an immature dependent individual who acted like a frightened adolescent who has never grown up, and is virtually incapable of assuming responsibilities for himself and hopes someone will take care of him. In the past his mother provided this care, followed by his sister and his first wife. Currently, claimant looks to insurance and welfare for such dependent care. Dr. Faguet concluded on September 28, 1976, that claimant was psychiatrically permanently disabled but that he estimated the disability to be referrable to his occupational injury of September 16, 1973, as "very slight". In May of 1977, Dr. Northrup indicated that he had not changed his opinion as stated in May of 1975. Dr. North-

rup indicated that claimant was psychiatrically permanent and stationary, that his prognosis was poor and that psychotherapy was not indicated.

Dr. Carl E. Graner, another psychiatrist, in October of 1978 concluded that claimant is a passive dependent personality which is essentially of life long duration and is not going to be changed by psychiatric treatment. Dr. Lambert, in a report of January 3, 1979, attempts to apportion claimant's orthopedic complaints to 50 percent for pre-existing factors and 50 percent for industrial injuries. There is absolutely no basis in fact for such apportionment. This same physician in a report of August 28, 1979, more accurately concluded that claimant was not physically disabled because of a 20 percent scoliotic curve which is rarely handicapping and his degenerative changes were not disabling. He finally concluded that claimant was not orthopedically disabled, yet in the next breath asserts that claimant's disability precludes him from heavy work as he has lost 25 percent

of his pre-injury capacity for bending, stooping, lifting, pushing, pulling, etc. The doctor concludes that claimant under AMA guidelines is suffering from a 1 1/2 percent disability of the whole man.

In March of 1979, Dr. Saar had concluded that claimant is suffering orthopedically from a 30 percent whole man impairment and he assessed 15 percent of his present disability to a pre-existing disability. Dr. Saar at various times refers to claimant's scoliosis as "significant", "moderate", "serious".

In a 27-page report dated June 15, 1979, Dr. Braverman, a psychiatrist, concludes that claimant has a 85 percent disability based upon physical and psychiatric factors without adequate explanation as to the basis for his concluding figure.

Dr. Graner, the psychiatrist who testified on behalf of employer in September 1979, disagrees with Dr. Braverman, feels that claimant is malingering to an extent, claims that claimant is suffering from a passive dependent personality disorder which pre-

existed his injury of September 16, 1973, and is of life long duration. Dr. Graner felt that claimant was capable of returning to his normal work from a psychiatric point of view, but that claimant does not wish to work despite his claims to the contrary. Dr. Graner's testimony was curious in view of his prognosis that claimant will be suicidal from time to time and psychiatric hospitalization may be required.

Mr. Donald Fila, a rehabilitation consultant, testified on behalf of employer that claimant is perfectly capable of working and he disagrees with Dr. Braverman who had concluded that claimant was unemployable. The rehabilitation counselor testified that claimant has the capability of working in retail sales, hotel work or the banking business where he would have an entry earning level capacity of $650 to $700 per month. Curiously, Mr. Fila acknowledges that claimant would not be able to get a job in the open labor market if his background were disclosed, but Mr. Fila felt that such a background need

not be disclosed. It is doubtful that claimant could conceal his emotional instability from an employer for any extended period of time.

From this muddled mass of conflicting medical opinion both orthopedically and psychiatrically, I conclude that, based upon the long standing rule that all doubts are to resolved in the claimant's favor, claimant is permanently and totally disabled. Dantes v. Western Foundation Corp. Association, 10 BRBS 541 (1979); Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

My impression is that the claimant is a pathetic former "playboy" from an economically advantaged Peruvian family who is preoccupied with his adult loss of status which has forced him to perform work beneath what he feels is his "station". His lack of self-esteem is not without foundation. He has a life long history of being the beneficiary of symbiotic relationships. I do not doubt that his personality disorder is a life long condition but prior to September 16, 1973, he exhibited a capacity to cope and function in an employ-

ment situation, however unsuited and unsavory. Orthopedically, he was temporarily and totally disabled until December 19, 1974, when Dr. Saar appropriately concluded that his condition was permanent and stationary. His orthopedic impairment was entirely the result of the injury of September 16, 1973, and not in any way attributable to any pre-existing orthopedic condition. Although there was some evidence of degenerative disc disease, it was asymptomatic until the injury of September 16, 1973, and certainly did not constitute a prior permanent partial disability of any substance. Similarly, the scoliosis which may have existed prior to the accident in 1973 was non-disabling and asymptomatic and did not constitute a prior partial disability.

The general consensus is that claimant is disabled from "heavy" work, however such orthopedic disability does not preclude claimant's employment in such positions as retail sales and banking. To the contrary, claimant would appear quite employable because he is intelligent, personable and has a bi-

lingual ability in Spanish and English which makes him quite marketable in the San Diego area where there is a large Spanish speaking population. His language ability is demonstrated by his capacity to obtain "B" grades in a college effort in a course which was taught and tested in English. If this case were limited to the orthopedic findings I would not find claimant permanently and totally disabled as I feel that he is physically capable of securing employment in retail sales, hotel work or banking in the San Diego area which is presently available and which by virtue of claimant's age, education, experience, personal qualities, bilingual ability, he is capable of performing or which he could be trained within a reasonable period of time. Dantes v. Western Foundation Corp. Association, 10 BRBS 541 (1979). The employer met its burden of showing the availability of realistic job opportunities within the geographic area where claimant resides which claimant has the physical capability of performing or for which he could be trained.

However, this case is not limited to claimant's orthopedic impairment but is more significantly related to his psychiatric impairment. I disagree with Dr. Graner who concluded that claimant was employable notwithstanding his depression, suicide attempt, likelihood of future psychiatric hospitalization, knife attacks on his wife, abortive attempts to strangle his wife in July of 1979, threats to burn his wife's face with a cigarette resulting from jealous rage, threats to his children, and lack of self-esteem. It would appear that despite claimant's statements to the contrary, he would be totally unable to maintain any employment because of psychiatric problems which manifest themselves not only in antisocial behavior but in frequent loss of memory, irresponsible behavior, and depression. Based upon observing claimant for four days I do not feel that he is malingering. I can understand how one might conclude such, as claimant has a tendency to react hysterically and communicate in a theatrical fashion. Undoubtedly he exaggerates, but such exaggera-

tion does not constitute malingering. Surveillance films suggest his physical mobility, not his personality disorders.

Psychiatrically, claimant became permanent and stationary as indicated by Dr. Faguet on September 28, 1976. I disagree with Dr. Faguet that claimant's permanent disability is only "slight" in view of the subsequent history of antisocial behavior, depression, suicidal gestures, and other self-destructive behavior. I, therefore, conclude that from the combined orthopedic and psychiatric impairments claimant's temporary total disability ceased on September 28, 1976, at which time he became permanently and totally disabled. Such permanent total disability is solely the proximate result of the injury of September 16, 1973.

With reference to the claim for section 8(f) relief by the employer, the employer must show that: (1) claimant had an existing permanent partial disability prior to the injury of September 16, 1973; (2) such disability was manifest to the employer; and that (3) the current disability is not due solely to the

subsequent injury of September 16, 1973. Dillingham Corp. v. Massey, 505 F.2d 1126, (9th Cir. 1974). The evidence is clear herein that claimant never had an existing permanent partial disability prior to the injury of September 16, 1973. The personality disorder which may have been of life long duration was not a "disability" within the meaning of section 2(10) of the Act which defines disability as meaning an incapacity because of injury to earn wages. Clearly, claimant was perfectly capable of employment and of coping prior to the injury of September 16, 1973. He was not economically disabled. Secondly, such disability was not manifest to the employer. The employer argues that if a psychiatric test had been given to claimant prior to his employment with Campbell Industries such personality disorder would have been manifest. Such an argument is highly speculative and there is no evidence that claimant was suffering from a disability which was manifest to the employer prior to the injury of September 16, 1973, within the meaning of

section 8(f) of the Act. Such conclusion applies not only to claimant's personality disorder but also to his scoliosis and disc disease. Finally, I conclude that claimant's current disability is due solely to the injury of September 16, 1973. Section 8(f) of the Act is not applicable.

Claimant has applied for payment of certain medical bills under section 7 of the Act. The following bills are payable under section 7 of the Act: Dr. Northrup, $306.50; Dr. Brantz, $308.00; Dr. Wood, $42.00; for a total of $656.50. The following bills are payable under section 28 of the Act as legal costs having been incurred subsequent to this case being transferred to the Office of Administrative Law Judges: Dr. Braverman, $500; Dr. Saar, $150. $252 of Dr. Saar's bill is disallowed as there is no indication as to why it was incurred. $250 for Dr. Braverman (The Hacker Clinic) is disallowed for the same reason. In addition a bill for the psychological testing of a man by the name of Paul Beach is disallowed as being unrelated to this

case. Claimed legal costs in the amount of $421.44 are disallowed as they were incurred prior to the transfer of the case to the Office of Administrative Law Judges. An application for reimbursement for such costs should be addressed to the Deputy Commissioner. Finally, other than as stated herein, amounts owed to Dr. Northrup and Dr. Brantz for legal costs should be addressed to the Deputy Commissioner as they were incurred prior to this case being transferred to the Office of Administrative Law Judges. It should be noted that some of the claimed bills for Dr. Northrup relate to unkept appointments by the claimant with his doctor. Certainly claimant should not seek reimbursement from employer for charges incurred as a result of his own failure to keep his appointments.

With reference to penalties and interest, since employer filed a notice of controversion on Qctober 3, 1977, the employer is liable for penalties under section 14(e) of the Act only for compensation due before filing of the notice of controversion. Oho v. Castle & Cook

Terminals, Ltd., 9 BRBS 989 (1979). Interest on unpaid installments is, of course, mandatory. Hadel v. ITO Corp., 6 BRBS 519 (1978).

With reference to attorney's fees counsel for claimant has itemized 91 3/4 hours of work for services rendered after the case was transferred to the Office of Administrative Law Judges on March 14, 1979. Where it is possible to segregate the five cases, it appears that 3.25 hours were devoted to the 4 claims which I have concluded do not entitle claimant to any further benefits under the Act. The remaining 88.5 hours are attributable to Case No. 79-LHCA-964-S, for which claimant is entitled additional benefits.

This was an unusually complex case due to the contradictory medical evidence which took almost 4 full days for trial. While I am critical of counsel for claimant presenting surprise medical evidence in June 1979 necessitating the continuance of the case until September 1979, it is likely the trial would have taken the same amount of time if tried to completion in June. It should be partic-

ularly noted that as difficult as the case was for claimant's counsel it was equally difficult to defend and all counsel demonstrated their professionalism. In awarding fees, I have considered the complex nature of the case prosecuted on behalf of a difficult client, the time spent, skill demonstrated, customary fees, results obtained, and all other factors pertinent. 20 C.F.R. §702.132; Preseley v. Tinsley Maintenance Service, 529 F.2d. 433 (5th Cir. 1976); Morris v. California Stevedore and Ballast Company, 10 BRBS 375 (1979). Counsel for employer did not file any objections to the fee application within the time required nor was there any timely request for additional time to file said objections. I conclude that 88.5 hours were reasonable and necessary and payable at the rate of $85.00 per hour for a total fee of $7,522.50.

All computations provided for in this Decision and Order are to be made by the Deputy Commissioner in accordance with the terms of this Decision and Order, and applicable provisions of the Act and regulations.

All computations set forth herein are subject to verification by the Deputy Commissioner.

ORDER

1. The employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall pay to claimant, compensation for temporary and total disability from September 16, 1973 through September 28, 1976, at the compensation rate of $110.93 per week based upon claimant's average weekly wage at the time of injury on September 16, 1973, in the amount of $166.40. Such payments shall be subject to credit for compensation payments previously made to the claimant.

2. The employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall pay to claimant compensation for permanent total disability from September 28, 1976, to the present and continuing at the compensation rate of $110.93 based upon claimant's average weekly wage on September 16, 1973, of $166.40 subject to credit for compensation payments previously made to the claimant and subject to any required periodic adjust-

ments as required by the Act.

3. The employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall pay as additional compensation an amount equal to 10 percent of the balance of all compensation which they presently owe to the claimant for compensation due prior to October 3, 1977, pursuant to section 14(e) of the Act.

4. The employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall further pay to claimant interest at the rate of 6 percent per annum on the balance of all accrued compensation due and payable to the claimant after credit is taken for compensation payments previously made to him, computed from the date that each payment was due until the date of actual payment.

5. Employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall pay for medical treatment and expenses as the nature of claimant's condition may require and shall in addition under section 7 of the Act pay to claimant $656.50 for

reimbursement of medical expenses.

6. Employer, Campbell Industries, and its insurance carrier, Eldorado Insurance Company, shall pay directly to counsel for claimant the sum of $7,522.50 for fees and $650 for costs.

7. All other claims for benefits under this Act except as provided in this Order are denied.

So Ordered this the 10th of October, 1979, in San Francisco, California.

/s/
HENRY B. LASKY
Administrative Law Judge

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APPENDIX B

AMENDED DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office

In the matter of	)
	)
HUGO LOSTAUNAU	)CASE NOS.
	)79-LHCA-964-S,
Claimant	)965-S, 972-S,
	)1219-S & 1220-S
v.	)
	)OWCP Nos.
CAMPBELL INDUSTRIES, INC.	)13-25471, 13-
	)16936, 13-17611,
Employer	)13-33655 & 13-
	)33486
ELDORADO INSURANCE COMPANY	)
	)
Carrier	)
	)
WESTERN EMPLOYERS INSURANCE COMPANY	)
	)
Carrier	)
	)

AMENDED DECISION AND ORDER

In the above entitled matter counsel for claimant was ordered to file his application for fees by September 24, 1979. He complied and submitted his application, dated September 20, 1979. Counsel for employer was ordered to submit his objections to the fee application, if any, no later than October 4, 1979. An untimely letter of objection dated October 9, 1979, was filed on October 11, 1979.

The Decision and Order had been issued on October 10, 1979. The objections to the fee application are disallowed as (1) untimely and (2) the hours allowed to counsel for claimant for preparation and trial of the matter were reasonable and necessary and do not appear to be excessive in view of the complex nature of the case.

In addition, page 10, paragraph 3, of the original Decision and Order is amended to include the following sentence:

> An "existing permanent partial disability", within the meaning of section 8(f), must affect the employee's ability to fully perform his work. Cordero v. Triple A Machine Shop, 8 BRBS 744 (1978). Claimant's ability to full perform his work prior to September 16, 1973, was not affected by his alleged pre-existing conditions.

ORDER

The Decision and Order, dated October 10, 1979, remains as stated except as other-

wise provided herein.

/s/
HENRY B. LASKY
Administrative Law Judge

DATED: October 12, 1979
San Francisco, California

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APPENDIX C

DECISION AND ORDER
OF BENEFITS REVIEW BOARD

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 79-688

HUGO LOSTAUNAU Claimant-Respondent v. CAMPBELL INDUSTRIES INC. and ELDORADO INSURANCE COMPANY Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	Filed as Part of Record Feb 23, 1981 (date) Agnes Kurtz Clerk DECISION AND ORDER

Appeal from the Decision and Order and Amended Decision and Order of Henry B. Lasky, Administrative Law Judge, United States Department of Labor

Donald W. Zellman (Brundage, Williams & Zellman), San Diego, California, for the claimant.

William H. Taylor (Taylor, Jones & Wilson), San Diego, California, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the employer from the Decision and Order and Amended Decision and Order (79-LHCA-964-S) of Administrative Law Judge Henry B. Lasky, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (hereinafter, the Act).

The administrative law judge held that the claimant was permanently totally disabled and that the employer was not entitled to relief under Section 8(f) of the Act. 33 U.S.C. §908(f). From both of these holdings, the employer brings this appeal.

The claimant began work in 1970 for employer as a waysman. During the course of his employment in 1971 and 1972, the claimant suffered four minor injuries. Decision and Order, slip op. at 3.

On September 16, 1973, claimant injured himself for the fifth time while working in his capacity as a waysman for employer. The claimant received medical attention and was advised not to return to work for a period of

time. Claimant attempted to return to work twice in November 1973 but was unable to perform his duties. Decision and Order, slip op. at 4. In 1974, claimant attempted to return to work with his employer with a light work restriction prescribed by his doctor. However, apparently no light work was available. Claimant has not worked since. Decision and Order, slip op. at 5.

Since the injury of September 16, 1973, the claimant has complained of varicus physical ailments, including low back pain. Decision and Order, slip op. at 4-5. Additionally, he has developed psychiatric difficulties which culminated in a suicide attempt in June 1979. Decision and Order, slip op. at 5-6.

Based on the evidence presented, the administrative law judge found that, due to claimant's combined orthopedic and psychiatric impairment, the claimant is totally disabled. Decision and Order, slip op. at 10. In so concluding, the administrative law judge found that the orthopedic impairment, while preventing the claimant from performing his usual

employment as a waysman, would not prevent him from performing suitable alternate employment which was available. Decision and Order, slip op. at 9. However, the administrative law judge found that the psychiatric impairment was such that the claimant was totally unable to perform any employment. Decision and Order, slip op. at 10.

The Board must affirm a decision if the facts found by the administrative law judge are supported by substantial evidence, are not irrational, and if the decision is in accordance with law. 33 U.S.C. §921(b)(3); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

There does not appear to be any dispute that claimant is unable to perform his usual employment. However, employer contends that it has met its burden of showing that suitable alternate employment is available to claimant and that claimant is therefore not totally disabled. We find no merit in employer's contention. After careful review of the record as a whole, we are of the opinion that there

is substantial evidence to support the administrative law judge's conclusion that claimant is unable to perform any employment and, therefore, is totally disabled. Especially probative are the opinions of Dr. Faguet, Cl. Ex. A, report of September 28, 1976, at 2; Dr. Northrup, Cl. Ex. A, report of May 20, 1977, at 4; Dr. Braverman, Cl. Ex. A, report of June 15, 1979, at 24; and Dr. Saar, Cl. Ex. A, report of March 29, 1979, at 4. We therefore affirm the administrative law judge's conclusion on this issue.

The employer further contends that the administrative law judge erroneously failed to find Section 8(f) of the Act applicable. 1/ We agree with employer and reverse the administrative law judge's conclusion on this issue.

The administrative law judge held that employer was not entitled to relief under

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1/ Claimant contends that Section 8(f) should not apply. However, claimant does not have standing to argue this issue. See Sims v. Singleton Electric Co., 9 BRBS 1068, BRB Nos. 79-199, 199A/B (1978).

Section 8(f) of the Act because the employer had failed to show (1) that claimant had an existing permanent partial disability prior to his work-related injury of September 16, 1973, (2) that such disability was manifest to the employer, and (3) that the disability was not due solely to the September 16, 1973, injury. Decision and Order, slip op. at 10, 11.

Our review of the administrative law judge's decision indicates that his finding of no preexisting disability was based on the fact that claimant was able to work prior to his September 16, 1973, injury. However, there is no requirement that the preexisting condition be economically disabling for Section 8(f) to apply. C & P Telephone Co. v. Director. 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), rev'g Glover v. C & P Telephone Co., 4 BRBS 23, BRB No. 75-300 (1976). The test is whether the claimant had such a serious physical disability that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk

of employment-related accident and compensation liability. C & P Telephone Co. v. Director, supra.

Our review of the record reveals that all of the evidence supports a finding that claimant had a preexisting permanent partial disability as required by the C & P Telephone test. Claimant sustained three back injuries prior to September 16, 1973, and was suffering from preexisting lumbar scoliosis and degenerative disc disease. 2/ Furthermore, the reports of the psychiatrists who examined claimant indicate that claimant had a preexisting psychiatric disability. 3/

2/ Emp. Ex. E-6, Dr. Lambert's report of August 28, 1979, at 4; Cl. Ex. A, Dr. Lambert's report of January 3, 1979, at 8-9; Cl. Ex. A, Dr. Saar's report of March 29, 1979, at 4-5; Cl. Ex. A, Dr. Saar's report of January 6, 1975, at 3.

3/ Emp. Ex. 7, Dr. Graner's report of August 29, 1979, at 9; Cl. Ex. A, Dr. Graner's report October 27, 1978, at 13; Cl. Ex. A, Dr. Braverman's report of July 15, 1979, at 13, 23; and Cl. Ex. A, Dr. Northrup's Deposition at 10.

Similarly, the evidence indicates that claimant's existing permanent partial disabilities were manifest to employer and that all the doctors attributed at least some of claimant's disability, both psychiatric and orthopedic, to his pre-September 16, 1973, condition. 4/

Accordingly, the administrative law judge should have found employer entitled to relief under Section 8(f) of the Act.

In addition, claimant's attorney has requested a fee for work performed before the Board in response to employer's appeal. Since the claimant has prevailed on the issue of total disability, the claimant is entitled to attorney's fees on appeal. Atlantic Gulf & Stevedores, Inc. v. Director, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976), aff'g and rev'g in part, 1 BRBS 541, BRB No. 74-102 (1975). However, the claimant's attorney included in his itemized statement of services time

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4/ As to the orthopedic disability, see Cl. Ex. A, Dr. Lambert's report of January 3, 1979; Cl. Ex. A, Dr. Saar's report of March 29, 1979. As to [cont'd]

spent researching and briefing the Section 8(f) issue. This time is not compensable. Monaghan v. Portland Stevedoring Co., 11 BRBS 190, 193, BRB No. 78-573 (1979); Sims v. Singleton Electric Co., 9 BRBS 1068, BRB No. 77-199 (1978); Nobles v. Children's Hospital, 8 BRBS 13, BRB Nos. 77-399 and 77-399A (1978); Schuster v. Roger-Smith Hotel Co., 7 BRBS 255, BRB No. No. 76-404 (1977).

The itemized statement of services indicates that five hours were spent on the Section 8(f) issue. Subtracting these five hours from the 16.5 hours requested, we find that the remaining 11.5 hours constitute a reasonable amount of time spent for the services rendered. These 11.5 hours are accordingly approved. We also approve the requested $90 hourly rate. Therefore, we hereby award $1,035 to claimant's counsel for

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[cont'd]
the psychiatric disability, Emp. Ex. 7, report of Dr. Graner of August 29, 1979, at 9; Cl. Ex. A, Dr. Braverman's report of June 15, 1979, at 23; Cl. Ex. A, Dr. Facquet's report of June 28, 1975, at 8; Cl. Ex. A, Dr. Northrup's Deposition at 10.

services performed on this appeal.

Accordingly, the Decision and Order and Amended Decision and Order of the administrative law judge is affirmed in part and reversed in part, and claimant's attorney is awarded a fee of $1,035 for services performed before the Board.

SO ORDERED.

/s/
SAMUEL J. SMITH, Chief
Administrative Appeals
Judge

We Concur:

/s/
JULIUS MILLER
Administrative Appeals
Judge

/s/
ISMENE M. KALARIS
Administrative Appeals
Judge

Dated this 23rd
day of February 1981

APPENDIX D

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner, v. CAMPBELL INDUSTRIES, INC., Respondent.	)	No. 81-7243 BRB No. 79-688 O P I N I O N (Filed Jun 4, 1982)

Appeal from a Decision of the Benefits Review Board Argued and submitted March 11, 1982

BEFORE: GOODWIN, SNEED and ANDERSON, Circuit Judges

GOODWIN, J.

The Director, Office of Workers' Compensation Programs petitions for review of a Benefits Review Board decision which affirmed the administrative law judge's findings that the employee-claimant was totally disabled and entitled to benefits but reversed the administrative law judge's finding that Campbell Industries was not entitled to relief under §8(f) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §908(f).

The issues on review are: (1) whether

the Board exceeded its scope of review of the administrative law judge's decision and (2) whether the employer met the requirements for relief under §8(f).

The claimant was a general laborer for Campbell. From 1971 through 1973, claimant sustained five injuries on the job. The first four accidents did not result in any residual medical problems and did not result in eligibility for benefits under the Act. Three claims were time-barred under §13(a) of the Act, 33 U.S.C. §913(a). The fourth claim was denied because the claimant was off work for the required period of time. 33 U.S.C. §906(a).

The fifth injury occurred on September 16, 1973 when Claimant injured his lower back shoveling sand. He received treatment and remained off work for six weeks. He attempted to return to work twice in November, 1973, but was unable to perform his regular duties. He has not worked since 1973. Claimant has received continual orthopedic treatment for his back and psychiatric treatment for severe emotional problems. Just before the hearings

in June, 1979, claimant attempted suicide.

The administrative law judge found that the claimant was permanently and totally disabled as a result of the injury of September 16, 1973, and also found that the employer was not entitled to relief under §8(f) of the Act.

Campbell appealed this decision to the Board. The Board affirmed the administrative law judge's finding of permanent total disability but reversed the administrative law judge's finding that Campbell was not entitled to relief under §8(f).

The Director of the Office of Workers' Compensation Program appeals the reversal of the administrative law judge on the §8(f) claim.

A. STANDARD OF REVIEW

Under §21 of the Act, 33 U.S.C. 921, the court of appeals must scrutinize Board decisions for "errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." Bumble Bee Seafoods v. Director, Office of Wkrs.', 629 F.2d 1327,

1329 (9th Cir. 1980). Some cases do not distinguish the functions of the Board and the administrative law judge. Sometimes the Board rather than the administrative law judge is described as the fact-finder. Duncanson-Harrelson Co. v. Director, Etc., 644 F.2d 827, 830 (9th Cir. 1981), National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1291 (9th Cir. 1979); Cordero v. Triple A Mach. Shop, 580 F.2d 1331, 1333 (9th Cir. 1978), cert, denied, 440 U.S. 911 (1979).

> "That holding places in focus the difference in functions between the Benefits Review Board and other administrative agencies. Unlike boards which can, on the record developed before an Administrative Law Judge, make independent factual determinations, the Benefits Review Board is restricted to substantial evidence review." 33 U.S.C. §921(b)(3). Atlantic & Gulf Stevedores v. Director, Etc., 542 F.2d 602, 608 (3rd Cir. 1976). [Footnote Omitted].

Accord: Bumble Bee Seafoods v. Director, Office of Wkrs.', 629 F.2d 1327, 1329 (9th Cir. 1980).

The Board must accept the administrative law judge's findings unless they are contrary

to the law, Cardillo v. Liberty Mutual Co., 330 U.S. 469, 477-78 (1947), irrational, O'Keefe v. Smith Associates, 380 U.S. 359, 362 (1965), or unsupported by substantial evidence in the record. O'Leary v. Brown-Pacific Maxon, 340 U.S. 504, 508 (1951); Bumble Bee Seafood v. Director, Office of Wkrs.', 629 F.2d at 1329; Army & Air Force Exchange Service v. Greenwood, 585 F.2d 791 (5th Cir. 1978); Presley v. Tinsley Maintenance Service, 529 F.2d 433, 436 (5th Cir. 1976). If the Board departs from this standard, the court must reverse. Bumble Bee Seafood v. Director, Office of Wkrs.', 629 F.2d at 1329; Atlantic & Gulf Stevedores v. Director, Etc., 542 F.2d at 608.

The Director argues that the Board exceeded its statutory scope of review in overturning the administrative law judge's finding that Campbell was not entitled to relief under §8(f). The medical evidence in this case could support more than one result.

Upon such a record, the Board should defer to the administrative law judge's findings on all fact questions unless the findings are

not supported by substantial evidence. The Board is not at liberty to reweigh the evidence and substitute its own view. 33 U.S.C. 921(b)(3).[1/] Questions of law are another matter.

B. LIMITATION OF LIABILITY UNDER §8(f)

§8(f) provides in pertinent part:

> "...In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide ... compensation for one hundred and four weeks only. (2) After cessation of the payments ... the employee ... shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of the title."
> 33 U.S.C. §908(f)

In order to obtain relief under §8(f),

1/ 33 U.S.C. 921(b)(3) provides in pertinent part:

> "The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole."

the employer must show (1) that the claimant had an existing permanent partial disability prior to the last injury; (2) that the disability was manifest to the employer, and (3) that the current disability is due solely to the most recent injury. Dillingham Corporation v. Massey, 505 F.2d 1126, 1128 (9th Cir. 1974). Accord: Duncanson-Harrelson Co. v. Director, Etc., 644 F.2d at 833.

The legislative history indicates that:

> "...the purpose of new §8(f) is to prevent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for §8(f). The Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers." C & P Tel. Co. v. Dir. Office of Wkrs.' Comp. Prog., 564 F.2d 503, 512 (D.C. Cir., 1977).

The administrative law judge found that Campbell was not entitled to relief under

§8(f) because: (1) claimant had no existing permanent partial disability prior to the injury of September 16, 1973; (2) whatever disability claimant had was not manifest to Campbell; and (3) claimant's current disability was due solely to the injury of September 16, 1973.

The Board reversed the administrative law judge's finding because: (1) Section 8(b) does not require that a preexisting condition be economically disabling (law); (2) claimant suffered from lumbar scoliosis and degenerative disc disease as a result of previous injuries (fact); and (3) claimant's permanent partial disabilities were manifest to his employer, because they were mentioned in his medical records which the employer had (fact).

The Director argues that the Board erred in granting Campbell relief under the second injury provision of §8(f) because (1) the claimant did not have a permanent partial disability (fact); (2) the claimant's condition was not manifest to Campbell (fact); and

(3) claimant's total disability was due solely to the injury of September 16, 1973 (fact).

1. Permanent Partial Disability

The most accepted definition of disability in §8(f) is set forth in C & P Tel. Co. v. Dir., Office of Wkrs.' Comp. Prog., 564 F.2d 503, 513 (D.C. Cir. 1977):

> ". . .To summarize, the term 'disability' in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. "Disability" under new §8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability. [Emphasis added].

Although the administrative law judge applied an economic disability standard, his finding should be upheld because the employer did not meet the more liberal test applied in C & P Telephone, 564 F.2d at 513. The claimant did not have a manifest physically disabling condition serious enough to motivate

a cautious employer to discharge him rather than incur the possibility of incurred liability. This was a finding of fact. Although the claimant had three previous back injuries, he returned to work within days, with no work restrictions, and without additional medical problems or medical care. Furthermore, Campbell did not treat the claimant as disabled. The underlying disc degenerative disease and scoliosis can be present in a large segment of the population and in the claimant's case were not diagnosed until after the last injury in 1973.

The claimant's psychological problems did not appear until after the 1973 injury even though the specialists thought that claimant's psychological condition had started to deteriorate long before the 1973 injury. From such testimony, it would be hard to argue that the claimant's mental problems constituted permanent partial disabilities under §8(f). The administrative law judge's findings of fact were supported by substantial evidence. Because the record

in this case contains conflicting evidence and this determination is a factual one, we uphold the administrative law judge's determination.

2. Latent - Manifest Test

Even if the claimant has a partial permament disability within the meaning of §8(f), courts have also adopted a "latent-manifest" test to determine if the employer is entitled to relief under §8(f). Duncanson-Harrelson Co. v. Director, Etc., 644 F.2d at 833-4; Atlantic & Gulf Stevedores v. Director, Etc., 542 F.2d at 609; Dillingham Corporation v. Massey, 505 F.2d 1125, 1128 (5th Cir. 1974).

Dillingham Corporation v. Massey, supra, phrased the test this way:

> "However, Congress did not intend that all pre-existing conditions come under coverage by the Fund, but only those 'manifest' at the time of initial employment. American Mutual Ins. Co. of Boston v. Jones, 138 U.S. App.D.C. 269, 426 F.2d 1263, 1267 (1970). An underlying condition which is not manifest to a prospective employer cannot qualify as a previous disability. United States Fidelity & Guaranty Co. v. O'Keefe, 240 F.Supp. 816 (S.D.Fla.1962). Thus, the key to the issue is the availability to the employer of knowledge of the

pre-existing condition, not necessarily the employers' actual knowledge of it. American Mutual, supra, 426 F.2d at 1267.

The determination of a previous disability's manifestation is a factual one, and a number of factors may come into play. The employee's appearance, medical reports and work experience are relevant, but the critical element is what the employer has available to him when the hiring occurs, should he decide to take notice of it. [Emphasis Added]

Dir., Office of W.C. Programs, U. S. Dept. of Labor, Etc., 575 F.2d 452, 456-7 (3rd Cir. 1978) applies a more liberal test in a case involving a claimant with heart disease and diabetes"

"Heart disease is not as obviously manifest a disability as is the loss of a limb or an eye. Nevertheless, in many instances heart disease is objectively determinable and objectively determined. The record before the administrative law judge contains the evidence of De Nichilo's prior hospitalization for a possible myocardial infarction and the testimony of Dr. Edward S. Wally that De Nichilo suffered from a coronary artery disease. The administrative law judge relied upon this evidence of De Nichilo's abnormal heart condition to conclude that the degree of stress De Nichilo underwent on December 28, 1974, produced the attack he suffered on that date.

> Although the administrative law judge did not use the word manifest, he found that De Nichilo had pre-existing physical infirmities of heart disease and diabetes mellitus. These were readily discoverable by any employer who looked at De Nichilo's medical record. That record makes the disability manifest. No more is required for the purpose of assuring that only eligible employers receive the insurance coverage provided by §8(f) of the Act." [Emphasis Added]

Under the De Nichilo Test, the employer could have seen the claimant's medical records which clearly indicated that he had heart disease and diabetes. Campbell had no medical records before the 1973 injury which show that the claimant had degenerative disc disease or psychological problems. Although the claimant had three back injuries, he was released for work each time. His back condition was asymptomatic until 1973. All the medical reports cited by the Board were after the 1973 injury. Furthermore, Campbell did not treat the claimant any differently after the other back injuries. The claimant resumed his normal work activities.

Even if there was some objective basis for determining that the claimant had a back

condition (Evidenced by the other back injuries), there was almost no objective basis for determining that he had severe psychological problems. These problems did not appear until after the 1973 injury when the claimant could no longer work. Only one psychiatrist testified that the employer could have discovered claimant's condition through a psychological test. There were no psychological symptoms manifested by the claimant.

3. 1973 Injury

The administrative law judge found that the weight of the evidence indicated that claimant's total disability was due solely to the 1973 orthopedic injury combined with psychiatric impairment. Even if claimant's conditions are manifest permanent partial disabilities, the employer must also show that the permanent total disability is not due solely to the last injury. A claimant's injury must "coelesce" with a previous disability. Dillingham Corporation v. Massey, 505 F.2d at 1128. The administrative law judge's finding in this case is based on

conflicting evidence. The evidence in support of the administrative law judge's finding was substantial evidence. The Board does not satisfactorily explain why it came to the opposite conclusion. We must affirm the factual findings of the administrative law judge.

Campbell did not meet the requirements for relief under §8(f) of the Act. Because the Board's scope of review is limited under the Act to overturning the administrative law judge only when the findings are contrary to law or unsupported by substantial evidence, we reverse the Board and reinstate the administrative law judge's decision.

Reversed.

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner, v. CAMPBELL INDUSTRIES, et al., Respondent.	)	No. 81-7243
	)	O R D E R

Before: GOODWIN, SNEED and ANDERSON, Circuit Judges

Respondents' petition for rehearing is denied.

Filed
Jul 2, 1982

Phillip B. Winsberry
Clerk, U. S. Court of Appeals

le

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

CAMPBELL INDUSTRIES, INC.;
ELDORADO INSURANCE CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

I, RUSSELL K. LAMBEAU, counsel of record for Campbell Industries, Inc.; Eldorado Insurance Company, and a member of the Bar of the Supreme Court of the United States, hereby deposes and says that on the 30th day of September, 1982, pursuant to Rule 33, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on each of the several parties thereto, as

follows:

1. On the United States, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the United States Department of Labor, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to Marianne Demetral Smith, Esquire, Frances Perkins Building, 200 Constitution Avenue, N.W., Suite N-2620, Washington, D.C. 20210.

3. On Donald W. Zellmann, Esquire, Brundage & Zellmann, Attorney for Claimant Lostaunau, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to P.O. Box 3172, San Diego, California 92103.

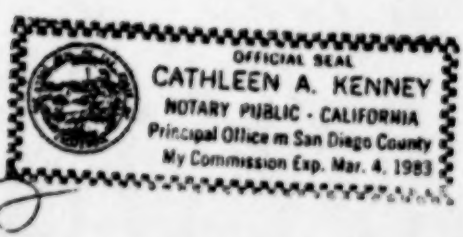
4. On the Clerk, United States Court of Appeals for the Ninth Circuit, by mailing one copy in a duly addressed envelope, with first-class postage prepaid to P.O. Box 547, San Francisco, California 94101

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

Russell K. Lambeau

RUSSELL K. LAMBEAU,
Counsel of Record for
Campbell Industries, Inc.;
Eldorado Insurance Co.

Subscribed and sworn
to before me this 30th
day of September, 1982.


OFFICIAL SEAL
CATHLEEN A. KENNEY
NOTARY PUBLIC - CALIFORNIA
Principal Office in San Diego County
My Commission Exp. Mar. 4, 1983

Cathleen A. Kenney

Cathleen Kenney, Notary
Public in and for said
County and State

Office-Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-577

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC., ET AL., PETITIONERS
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 8(f) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908(f), limits an employer's liability for compensation to 104 weeks where the injured employee did not have a pre-existing disability manifest to the employer prior to the disabling injury.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Atlantic & Gulf Stevedores, Inc. v. *Director, OWCP*, 542 F. 2d 602 6

Avondale Shipyards, Inc. v. *Vinson*, 623 F.2d 1117 7

Bumble Bee Seafoods v. *Director, OWCP*, 629 F.2d 1327 7

C&P Telephone Co. v. *Director, OWCP*, 564 F.2d 503 ..... 4, 5, 6

Dillingham Corp. v. *Massey*, 505 F.2d 1126 6

Director, OWCP v. *Universal Terminal & Stevedoring Corp.*, 575 F. 2d 452 5

Equitable Equipment Co. v. *Hardy*, 558 F.2d 1192 5

General Dynamics Corp. v. *Director, OWCP*, 673 F.2d 23 5

Lawson v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198 ..... 4, 5

O'Keeffe v. *Smith Associates*, 390 U.S. 359 7

Page

Cases—Continued:

Ridgley v. *Ceres, Inc.*, 594 F.2d 1175 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.* 2

Section 2(10), 33 U.S.C. 902(10) 5
Section 8(f), 33 U.S.C. 908(f) 2, 3, 4, 5, 6
Section 8(f)(1), 33 U.S.C. 908(f)(1) 2
Section 21(b)(3), 33 U.S.C. 921(b)(3) 7
Section 44, 33 U.S.C. 944 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-577

CAMPBELL INDUSTRIES, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1d-15d) is reported at 678 F.2d 836. The decision of the Benefits Review Board (Pet. App. 1c-10c) is reported at 13 Ben. Rev. Bd. Serv. (MB) 227. The decision and the amended decision of the administrative law judge (Pet. App. 1a-3la, 1b-3b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982. A petition for rehearing was denied on July 2, 1982 (Pet. App. 1e). The petition for a writ of certiorari was filed on September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Hugo Lostaunau, a waysman (general laborer) employed by petitioner Campbell Industries, sustained four minor injuries on the job in 1971 and 1972. In each instance, he returned to his normal work within days and without any residual medical problems (Pet. App. 5a-6a, 2c, 2d). On September 16, 1973, Lostaunau twisted his lower back while shoveling sand for a sandblaster pot utilized in ship repair. He also developed psychiatric problems after this injury, culminating in physical assaults on his wife, threats to his children, and a suicide attempt in 1979 (*id.* at 11a-13a, 3c, 2d-3d). Although Lostaunau made several attempts to resume his duties, he has not worked since 1973 (*id.* at 9a, 3c, 2d).

2. Following the 1973 injury, Lostaunau applied for compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* After hearing extensive conflicting medical evidence with respect to both the orthopedic and psychiatric problems, the administrative law judge concluded that Lostaunau was permanently and totally disabled at the time of the hearing and therefore entitled to compensation (Pet. App. 23a). The administrative law judge also found that petitioners were not entitled to have their liability limited to 104 weeks of compensation pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f) (Pet. App. 23a-25a).[1] Petitioners failed to qualify for this statutory limitation on liability because Lostaunau did not have

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[1]Section 8(f)(1), 33 U.S.C. 908(f)(1), provides in pertinent part:

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury * * *. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and

an existing permanent partial disability before the 1973 injury; in reaching this conclusion, the administrative law judge found that Lostaunau was not "economically disabled." Furthermore, the administrative law judge found that the 1973 injury was the sole cause of Lostaunau's disability, and if he had a pre-existing partial disability arising from a personality disorder or disc disease, it was not manifest to his employer (*id.* at 24a-25a).

Petitioners appealed the administrative law judge's ruling to the Benefits Review Board.[2] The Board reversed with respect to Section 8(f), holding that the administrative law judge erroneously equated "permanent partial disability" with economic disability (Pet. App. 6c). After independently evaluating the evidence, the Board found that Lostaunau had an "existing permanent partial disability" prior to the 1973 accident, that this condition was manifest to the employer, and that Lostaunau's current disability was, in part, attributable to his prior medical problem (*id.* at 6c-8c).

3. The court of appeals reversed the Board and reinstated the administrative law judge's decision. In so doing, the court of appeals acknowledged that the administrative

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(e) of this section, compensation payments or death benefits for one hundred and four weeks only. • • •

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraph (b) and (e) of this section, compensation for one hundred and four weeks only.

After 104 weeks, the compensation due the employee or the survivor is paid out of a special fund established by Section 44 of the LHWCA, 33 U.S.C. 944, commonly called the second injury fund. 33 U.S.C. 908(f)(2).

[2]The Director of the Department of Labor's Office of Workers' Compensation Programs appeared as a respondent before the Board.

law judge had erroneously equated permanent partial disability with economic disability. The court held, however, that the administrative law judge's findings of fact precluded a finding of a pre-existing permanent partial disability even under the liberal standard used by the Board. See *C & P Telephone Co.* v. *Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977). As stated in *C & P Telephone* (564 F.2d at 513), that standard provides that a pre-existing disability is present if "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." See Pet. App. 6c-7c, 9d-11d.

Finally, the court of appeals concluded that the Board had exceeded its authority by substituting its own factual findings for those reached by the administrative law judge (Pet. App. 3d-6d, 7d-11d, 13d-15d). In particular, the court noted that whether a pre-existing disability was manifest to the employer was a factual question (*id.* at 7d-8d) and that the evidence supported the administrative law judge's finding that neither the degenerative disc disease nor the psychological problems were manifest before the 1973 injury (*id.* at 24a-25a, 13d-14d).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. In fact, the court's interpretation of the circumstances under which an employer is entitled to the Section 8(f) limitation on liability falls squarely within the accepted legal standard. Accordingly, further review by this Court is unwarranted.

1. Petitioners' principal contention (Pet. 18-21) appears to be that the court of appeals' decision conflicts with the decision of this Court in *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949), and with decisions of

other courts of appeals refusing to limit pre-existing disabilities to conditions affecting earning capacity.[3] The major premise of petitioners' argument — that the court below applied an economic disability standard — is erroneous. The court below expressly rejected an economic disability standard, and applied instead a broader standard more favorable to petitioners (Pet. App. 9d-10d).[4]

The standard the court of appeals applied is correct and is fully in accord with the purposes of Section 8(f). In *Lawson* v. *Suwannee Fruit & Steamship Co., supra,* 336 U.S. at 201, this Court reviewed the congressional intent behind the second-injury relief provision and identified "the prevention of employer discrimination against handicapped workers" as "one of the major purposes." Accordingly, the Court properly defined those disabilities that will excuse the employer from full liability in such a way as to remove the incentive that would otherwise be present for employer

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[3]The economic disability standard derives from the definition of "disability" in Section 2(10) of the LHWCA, 33 U.S.C. 902(10), which states: " 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The courts, however, have not applied the economic disability concept to Section 8(f) pre-existing disabilities; rather, they have held that "[s]uch a construction defeats the very purpose of new §8(f) by leaving many workers with physical disabilities without the protection intended by Congress." *C & P Telephone Co.* v. *Director, OWCP,* 564 F.2d 503, 512 (D.C. Cir. 1977). See, *e.g., General Dynamics Corp.* v. *Director, OWCP,* 673 F.2d 23, 26 (1st Cir. 1982); *Director, OWCP* v. *Universal Terminal & Stevedoring Corp.,* 575 F.2d 452, 455 (3d Cir. 1978); *Equitable Equipment Co.* v. *Hardy,* 558 F.2d 1192, 1196-1198 (5th Cir. 1977).

[4]Although it disagreed with the legal standard used by the administrative law judge, the court of appeals nevertheless agreed with his ultimate determination that Lostaunau did not have a pre-existing disability. Under either standard the administrative law judge's findings of fact established the absence of a pre-existing disability (Pet. App. 9d-10d).

discrimination in the hiring and retaining of employees with pre-existing disabilities. *Id.* at 201-204. See *C & P Telephone Co.* v. *Director, OWCP, supra,* 564 F.2d at 512.

Petitioners also object to the requirement that the pre-existing disability be "manifest to the employer" (Pet. 24-25). This widely accepted requirement,[5] however, effectuates the anti-discriminatory purposes underlying Section 8(f) and identified in *Lawson.* Clearly, "if the previous disability had not been manifest, the employer would have had no reason to discriminate against the handicapped person in hiring or firing." *C & P Telephone Co.* v. *Director, OWCP, supra,* 564 F.2d at 514 n.10.[6] Any previous condition that was not "manifest" — *i.e.*, of which knowledge was not available to the employer "should he decide to take notice of it" —cannot be considered an "existing permanent partial disability," *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1128 (9th Cir. 1974).

2. Petitioners also contend (Pet. 25-26) that the court of appeals usurped the factfinding function of the administrative law judge by determining that Lostaunau did not suffer from a pre-existing disability. This contention is erroneous. The court merely applied the appropriate definition of permanent partial disability to the administrative law judge's findings of fact (Pet. App. 9d-11d). In so doing, the court

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[5]See, *e.g.*, *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1178 (8th Cir. 1979); *Atlantic & Gulf Stevedores, Inc.* v. *Director, OWCP,* 542 F.2d 602, 609 (3d Cir. 1976); *Dillingham Corp.* v. *Massey,* 505 F.2d 1126, 1128 (9th Cir. 1974).

[6]Petitioners also suggest (Pet. 21) that the court below inappropriately imposed additional, more stringent requirements. The petition cites a number of factual findings from the opinions of the administrative law judge and the court of appeals in support of this contention (*ibid.*). The cited findings, however, were offered by both the administrative law judge and the court as facts supporting their conclusions and not as legal prerequisities.

preserved the well-established inter-relationship between the administrative law judge, the Benefits Review Board, and the court of appeals: neither the Board nor the court may overturn the administrative law judge's findings of fact unless the findings are not supported by substantial evidence or are irrational. See, *e.g.*, Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359, 362 (1965); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Avondale Shipyards, Inc.* v. *Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). Because the court of appeals based its legal conclusion that Lostaunau did not suffer from a pre-existing disability on findings supported by substantial evidence, further review by this Court is unwarranted. Moreover, this Court has noted that it will only rarely review a decision by a court of appeals that an agency decision is supported by substantial evidence and will do so only if the standard has been "misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[7]

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[7]Petitioners make a number of additional general assertions concerning errors in the court's and the administrative law judge's handling of the facts (Pet. ii, 25-26), but fail to specify the purported errors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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KAREN I. WARD
Associate Solicitor

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DECEMBER 1982

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CLERK

No. 82-577

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC.;
ELDORADO INSURANCE CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Statutes Involved	ii
Statement of the Case	1
Reasons for Denying Petition	3
Request for Attorney's Fees	12
Conclusion	13
Proof of Service	14

TABLE OF AUTHORITIES

Cases:

American Mutual Insurance Company of Boston v. Jones, 426 F. 2d 1263 (1970) 10, 11

Atlantic and Gulf Stevedores, Inc. v. Director, OWCP, 542 F. 2d 602, 4 BRBS 79 (3d Cir. 1976) 7

C & P Telephone v. Director, OWCP, 564 F. 2d 503 (D.C. Cir. 1977) 7, 8

Calbeck v. Strachan Shipping Co., 306 F. 2d 693 (5th Cir. 1962) 5

Cordero v. Triple A Machine Shop, 580 F. 2d 1331, 8 BRBS 744 (9th Cir. 1978) 7

Dillingham Corporation v. Massey, 505 F. 2d 1126 (9th Cir. 1974) 5

John W. McGrath Corp. v. Hughes, 289 F. 2d 403 (2d Cir. 1961) 5

Lawson v. Swanee Fruit & Steamship Co., 336 U.S. 198, 69 S. Ct. 503 (1949) 10

U.S. v. Johnson, 268 U.S. 220 (1925) 4

Statutes:

33 U.S.C. 908(f) 2,3,4, 5,6,8, 9, 10, 11

3 U.S.C. 928(c) 12

STATUTES INVOLVED

1. §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. 908(f) provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title.

2. §928(c) of such Act, 333 U.S.C. 928 provides in pertinent part:

(c) In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board or court shall fix in the award approving the fee, such lien and manner of payment.

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CIRCUIT

Respondent, LOSTAUNAU, herein opposes Petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF CASE

Claimant, HUGO LOSTAUNAU, a waysman working for Petitioner, suffered orthopedic and

psychiatric injuries in the course and scope of his employment with Petitioner.

At the time of Trial before the Administrative Law Judge, extensive lay and expert evidence was offered by both parties. The Administrative Law Judge found that the Claimant was injured in the course and scope of his employment with Petitioner; the claimant was permanently and totally disabled solely as a result of the injury of September 16, 1973; the Claimant had no disability prior to the injury of September 16, 1973; and that the Petitioner was aware of no disability affecting Claimant at the time of hire or on September 16, 1973.

On the basis of these findings, the Claimant was awarded temporary total disability, permanent total disability and the Petitioner was denied §908(f) relief.

Petitioners then appealed to the Benefits Review Board, urging that the Claimant had a pre-existing partial disability

prior to September 16, 1973 and that this disability was "manifest" to the Petitioner prior to that date. The Benefits Review Board reversed the Administrative Law Judge, stating that "the evidence supports a finding that Claimant had a pre-existing permanent partial disability".

The Director then appealed to the Ninth Circuit Court of Appeals, alleging that the Benefits Review Board had exceeded its scope of review of the Administrative Law Judge's decision.

The Ninth Circuit Court of Appeals stated that the Petitioner herein did not meet the requirements for relief under §908(f) and that the Administrative Law Judge's finding was based upon substantial evidence.

REASONS FOR DENYING PETITION FOR CERTIORARI

I

PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS BASED ON

FACTUAL QUESTIONS WHICH ARE NOT PROPERLY REVIEWABLE BY THIS COURT.

The only real questions the Petitioner raises in its petition involve the particular facts of this case alone and are of interest only to the parties to it. In essence, Petitioner asks this Court to make a third review of the Trial record to see if it can find what the Administrative Law Judge was unable to find. The Court has previously ruled that such fact canvassing is not a task to be served by a grant of certiorari. United States v. Johnson, 268 U.S. 220, 227 (1925)

In this case, Petitioner seeks relief under §908(f) of the Longshoremen's and Harbor Workers' Compensation Act. In order to obtain relief under §908(f), the employer must show (1) that the claimant had an existing permanent partial disability prior to the last injury; (2) that the disability was manifest to the employer; and (3) that the current disability is not due solely to the

most recent injury. Dillingham Corporation v. Massey, 505 F. 2d 1126, 1128 (9th Cir. 1974).

The three above-mentioned criteria required for §908(f) relief are factual showings for which both parties offered evidence at Trial. Following the offering of evidence at Trial, the Administrative Law Judge weighed the evidence and made a determination based on what he felt was the more credible evidence. Lay and medical witness credibility is an issue for the Administrative Law Judge to decide as the trier of fact. The Benefits Review Board must respect the Administrative Law Judge's evaluation of the evidence. Calbeck v. Strachan Shipping Co., 306 F. 2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); John W. McGrath Corp. v. Hughes, 289 F. 2d 403 (2d Cir. 1961).

The review and change of the evidential findings of the Administrative

Law Judge, by the Board, was improper and contrary to established case law. The reinstatement of the Administrative Law Judge's decision by the Ninth Circuit Court of Appeals was entirely in accordance with law. Any further review of these evidential discrepancies are not within the purview of a grant of certiorari and on those grounds the Petition in this case should be denied.

II

THE COURT BELOW GAVE FULL CONSIDERATION TO THE ISSUE OF "EXISTING PERMANENT PARTIAL DISABILITY" AS USED IN §908(f) AND DECIDED CORRECTLY.

The Petitioner claims that the meaning of "existing permanent partial disability", as used in §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, is confused to the point where its plain meaning is obscured. As a result, the Petitioner claims that the Ninth Circuit Court of Appeals was unable to properly decide whether such a disability did exist in

the present case.

Through the briefs of the parties, the Court of Appeals was apprised of the various standards for establishing an "existing permanent partial disability". In Atlantic and Gulf Stevedores, Inc. v. Director, OWCP, 542 F. 2d 602, 4 BRBS 79 (3d Cir. 1976), that Court held that such a disability was present where the disability was economically disabling. In Cordero v. Triple A Machine Shop, 580 F. 2d 1331, 8 BRBS 744, (9th Cir. 1978), the Court stated that such a disability was present where it interfered with the employee's ability to perform his work.

In the present case the Ninth Circuit was quite clear in applying the standard set forth in C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), where it stated at pages 5 and 6:

> "The most accepted definition of disability in §8(f) is set forth in C & P Tel. Co. v. Dir, Office of Wkrs.' Comp. Prog., 564 F. 2d 503, 513 (D.C. Cir. 1977):

> '. . .To summarize, the term 'disability' in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new §8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of greatly increased risk of employment-related accident and compensation liability.'"

What we have is not a question of an "eroded" or "confused" statute. On the contrary, the meaning given to the statute by case law is quite clear. Petitioner simply did not show that there was an "existing permanent partial disability" at the time of hire or injury no matter what standard is applied.

III

THE PETITIONER FIRST PRESENTED ITS ARGUMENT OF STATUTORY INTERPRETATION OF §908(f) AT THE NINTH CIRCUIT COURT OF APPEALS AND THEREFORE HAD NOT

EFFECTIVELY PRESERVED ITS
RIGHT TO RAISE THAT ISSUE.

Before the Administrative Law Judge and the Benefits Review Board the Petitioner has argued that the Respondent's pre-existing disability was manifest to the employer at the time of hire and on the date of injury, giving the employer the right to §908(f) relief.

Before the Ninth Circuit Court of Appeals, for the first time, the Petitioner asserted that a proper reading §908(f) would not require the Petitioner to have knowledge of the Respondent's pre-existing disability as a condition precedent to §908(f) relief. Petitioner now asserts this same argument before this Court.

The Petitioner did not effectively preserve its right to assert this argument on appeal where it did not raise the issue in the Courts below and for that reason, its Petition must be denied.

IV

PETITIONER'S PROPOSAL TO ABOLISH THE "MANIFEST" REQUIREMENT FOR OBTAINING §908(f) RELIEF IS WITHOUT MERIT.

This Court in Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198, 69 S. Ct. 503 (1949), stated that one of the major purposes of §908(f) was the prevention of employer discrimination against handicapped workers.

The "manifest" requirement goes right to the heart of this stated purpose. Any such discrimination against a handicapped worker must rest upon knowledge of the handicap upon which the discrimination is based. American Mutual Insurance Company of Boston v. Jones, 426 F. 2d 1263 (1970). If the purpose of this legislation is as this Court stated in Lawson, supra, then the "manifest" requirement is impliedly a requirement for benefits under that legislation.

To cut out the "manifest" require-

ment as suggested by Petitioner, would only reward those employers who overwork and mistreat their employees. When the worker who becomes injured while working for such an employer applies for benefits, the employer must allege merely that that worker had a disability prior to hire. If that employer is not required to show that the prior disability was manifest at the time of hire or injury, after the initial 104-week benefit period, the Special Fund must foot the bill for this employer. The purpose of §908(f) is not to provide such a windfall to employers. American Mutual Insurance Company of Boston v. Jones, supra, at 1267.

Reckless employers should not be rewarded by being allowed to spread their liability amongst the other contributors to the Special Fund out of which §908(f) liabilities are paid. It would make more sense to tax each employer on the basis of the injury claims it has against it in order to fund the Special Fund. In that way, there

would be more incentive to provide a safe place in which to work.

REQUEST FOR ATTORNEY'S FEES

Respondent is entitled to an award of reasonable attorney's fees for responding to the Petitioner's Petition for Writ of Certiorari under 33 U.S.C. 928(c).

Repondent's attorney is a certified Workers' Compensation Specialist. Below please find an itemized statement of the extent and character of the legal services rendered in responding to the employer's petition.

Review of employer's Petition for Writ of Certiorari . . . . . 3 hours

Research on Section 8(f), time limit on response and cited cases . . . . . .3 hours

Draft Response to Petition for Writ of Certiorari . . . . . 6 hours

Total Time Spent: . . . . . .12 hours

Based on the corporate

hourly rate of $140.00, our reasonable attorney's fee would be $1,680.00.

CONCLUSION

Based on the above-enumerated points and authorities, the Petition for Writ of Certiorari should be denied and a reasonalble attorney's fee of $1,680.00 should be awarded to Claimant.

Respectfully submitted,

BRUNDAGE & ZELLMANN

By: _____
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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITION FOR WRIT OF
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COURT OF APPEALS FOR THE NINTH
CIRCUIT

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

I, DONALD W. ZELLMANN, counsel of record for Hugo Lostaunau, and a member of the Bar of the Supreme Court of the United States, hereby depose and say that on the 5th day of November, 1982, pursuant to Rule

33, I served the within RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on each of the several parties thereto as follows:

1. On the United States, by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the United States Department of Labor, by mailing three (3) copies in a duly-addressed envelope, with first-class postage preapid to Marianne Demetral Smith, Esquire, Frances Perkins Building, 200 Constitution Avenue, N.W., Suite N-2620, Washington, D.C. 20210.

3. On Russell K. Lambeau, Esquire, Taylor, Jones and Wilson, Attorney for Campbell Industries, Inc.; Eldorado Insurance Co., by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid to 2725 Congress Street, Suite 2E, San Diego, California 92110.

4. On the Clerk, United States Court of Appeals for the Ninth Circuit, by mailing one (1) copy in a duly-addressed envelope, with first-class postage prepaid to Post Office Box 547, San Francisco, CA. 94101.

It is further certified that all parties required to be served have been served, and that

the list of such parties is as set forth above.

DONALD W. ZELLMANN,
Counsel of Record for
Claimant, Hugo Lostaunau

Subscribed and sworn to
before me this 4th day
of November, 1982.

Notary Public in and for
said County and State